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OPENING THE GATES: INFORMANTS AND PROBABLE CAUSE AFTER MASSACHUSETTS V. UPTON

Since the U.S. Supreme Court's decision in Illinois v. Gates [103 S. Ct. 2317 (1983)] much uncertainty has arisen in legal and law enforcement circles concerning the effect of the ruling on determinations of probable cause for warrants based on informant information. Specifically the question has arisen whether the Aguilar - Spinelli "two-pronged" test for informant reliability is still to be used, as modified by the Gates "totality of circumstances" test or whether Aguilar - Spinelli has been laid to rest. A brief recap of those tests is as follows:

In the cases of Aguilar v. Texas [378 U.S. 108 (1964)] and Spinelli v. U.S. [393 U.S. 410 (1969)], the U.S. Supreme Court created a "two-pronged" rule for the use of informant information in the establishment of probable cause for search or arrest warrants. Quite simply, the rule said that informant information standing alone may be used to establish probable cause for a warrant if two prongs were satisfied: 1) The basis of knowledge of the informant was established for the person determining probable cause (e.g., magistrate). That is to say, "How does the informant know the information reported to be true?" 2) The reliability and credibility of the informant was established as well. That is to say, "Why should the informant's information be believed?"

In Illinois v. Gates, the U.S. Supreme Court re-examined this "two-pronged" test and decided that it should be replaced with a "totality of the circumstances" test in

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which an informant's basis of knowledge (prong 1) and reliability and credibility (prong 2) were to be matters considered in the determination of probable cause but were not to be seen as "strictly separate requirements" upon which a determination of probable cause had to rest.

After the Gates decision many courts continued to rule that the Aguilar - Spinelli test for informant's information was alive and well but was modified by Gates so that the test had now become a "two-pronged" test which looked to the "totality of the circumstances" in determining whether both prongs were satisfied.

In other words, after Gates, a magistrate could look at all information available in determining whether both prongs of the Aguilar - Spinelli test were satisfied.

Thus, if the "basis of knowledge" prong of the test was very weak many courts held that probable cause could nonetheless be found if, under the "totality of the circumstances", the "reliability and credibility" prong was so strong so as to overcome the weak first prong. This interpretation of the effect of Gates left law enforcement in an area of great uncertainty.

Any uncertainty which was created by Gates has now been cleared up by the U.S. Supreme Court. In its decision in Massachusetts v. Upton (35 CrL 4044-May 14, 1984), the high court lays to rest any notion that Aguilar - Spinelli is alive or well. The court states, "we did not merely refine or qualify the 'two-pronged test' [in Gates]. We rejected it as hypertechnical and divorced from the 'factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act'". [Upton at 4044, quoting Brinegar v. U.S., 338 U.S. 160 (1949), (emphasis supplied)].

Thus the Supreme Court buried, once and for all, any speculation that law enforcement officers are subject to the "two-pronged" test of Aguilar - Spinelli in seeking warrants based on informant information. The new "totality of circumstances" rule says that a magistrate must make a determination of probable cause based upon the totality of the information available. No longer is an independent showing of informant knowledge and credibility required where the circumstances, as a whole, indicate a "substantial basis" for a finding of probable cause. Thus the court left the determination squarely within the discretion of the magistrate without the restraints of the "two-pronged" test.

The court also criticized reviewing courts for holding after-the-fact de novo hearings to determine probable cause, and stated such action is "inconsistent both with the desire to encourage use of the warrant process by police officers and with

the recognition that once a warrant has been obtained, intrusion upon interests protected by the Fourth Amendment is less severe than otherwise may be the case."

A magistrate need merely decide, based on information presented, whether it is more likely than not that either the person to be charged committed the crime or the place to be searched contains contraband or evidence of a crime. This new approach allows law enforcement officers to present all the pertinent pieces of information collected from an informant in an investigation to attempt to persuade a magistrate of the presence of probable cause rather than be limited strictly to a showing of the informant's credibility and the basis of his knowledge.

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